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THE TRIBE, THE EMPIRE, AND THE NATION: ENFORCEABILITY OF PRE-REVOLUTIONARY TREATIES WITH NATIVE AMERICAN TRIBES*

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If there fall out any wars between us and them, what their fight is likely to be, we having advantages against them so many manner of ways, as by our discipline, our strange weapons and devices else, especially by ordinance great and small, it may easily be imagined; by the experience we have had in some places, the turning up of their heels against us in running away was their best defence.

-Thomas Harriot, 1588[1]

Thomas Harriot's insightfulness in the late sixteenth century carried a prophetic chill as, despite the Natives' flight, the Western Age of Exploration precipitated the virtual destruction of various Native American cultures that had flourished in North America for millennia.[2] Although many lament this loss, current attitudes concerning the rights and powers of Native American tribes in the United States betray the same base self-interest of our colonial forefathers. These attitudes of passive sympathy came to the forefront in a recent series of decisions concerning the construction of a new reservoir on the Mattaponi River in southeastern Virginia. The Mattaponi tribe, a remnant of the once great Powhatan Confederacy, alleges that the construction of this reservoir—which, due to rapid population growth, is becoming a necessity for Virginia—infringes upon rights guaranteed in the 1677 Treaty of Middle Plantation.[3] The *Mattaponi* case is complex, presenting a number

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[1] THOMAS HARRIOT, THE INDIAN METHOD OF WARFARE (1588), *reprinted in* MAJOR PROBLEMS IN AMERICAN COLONIAL HISTORY: DOCUMENTS AND ESSAYS, 13 (Karen Ordahl Kupperman ed., Lexington, 1993).

[2] RICHARD MIDDLETON, COLONIAL AMERICA: A HISTORY, 1565–1776, 18 (3rd ed. 2002) (1992).

[3] Petition for Writ of Certiorari at 1, Mattaponi Indian Tribe v. Virginia, 126 S. Ct. 2862 (2006) (No. 05-1141); Treaty of Middle Plantation (1677), *in* 4 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789 82 (Alden T. Vaughan & W. Sitt Robinson eds., 1983).

of difficult questions. One of these questions, however, has never been seriously discussed by legal scholars: whether pre-revolutionary treaties between Native American tribes and the British Empire are enforceable under the Supremacy Clause of the United States Constitution.[4] This note seeks to answer this question using the *Mattaponi* case as a lens for analysis.

Resolving this issue requires an understanding of various historical and legal elements. This note begins with discussions of the British colonial presence in Virginia, the inception of the Treaty of Middle Plantation, and the procedural history of *Mattaponi Indian Tribe v. Commonwealth of Virginia*.[5] Having illustrated the historical and procedural contexts of the case, this note then turns to the intent of the framers to provide the federal government with complete power over Native American affairs and treaty-making and how this intent should be applied to the *Mattaponi* case. This note then presents the international law doctrine of universal succession as a plausible explanation of how the framers may have understood the United States' obligations to Native American tribes that had treated with the British.[6] Finally, this note will discuss some of the basic elements of federal Native American law and why their application in the *Mattaponi* case produces the most just result for the Mattaponi. In short, this note advocates the application of the doctrine of universal succession to pre-revolutionary treaties between the British and Native American tribes. This would result in a presumption of enforceability at the federal level for these treaties, and afford them the protections of the established body of federal Native American law, as opposed to the possibly divergent and unfavorable Native American law developed by the states.

THE COLONIAL EXPERIENCE

The Mattaponi's plight did not begin with Virginia's decision to abrogate their tribal rights in favor of assuring an adequate water supply. In fact, the issues of tribal rights and sovereignty are rooted in the first encoun-

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[4] Petition for Writ of Certiorari *supra* note 3. Scholars estimate that, in addition to treaties executed with other European countries, Native Americans entered into 175 Crown treaties negotiated by either the British Government or the British colonies. Dorothy Jones, *British Colonial Indian Treaties in* 4 HISTORY OF INDIAN-WHITE RELATIONS 185, 185–94 (Wilcomb E. Washburn ed., 1988), *cited in* David Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY. U. L. REV. 277, 292 (1998).

[5] 126 S. Ct 2862 (2006). The case below was cited as 270 Va. 423; 621 S.E.2d 78.

[6] The doctrine of universal succession holds that a new state is bound by the treaty obligations of its parent state upon its independence. *See* C. Emanuelli, *State Succession, Then and Now, With Special Reference to the Louisiana Purchase (1803)* 63 LA. L. REV. 1277, 1280 (comparing and contrasting the doctrine of universal succession and the newer clean-slate doctrine). The tenets of universal succession will be discussed at length later in the note. *See infra* pp. 916–19.

ters between the Native Americans and the colonial powers of the sixteenth and seventeenth centuries. Historians estimate that in 1600 approximately 500,000 Native Americans lived east of the Allegheny Mountains and that some 30,000 of those lived in the lower Chesapeake region.[7] Unfortunately, by 1677 only five percent of the population of the great Powhatan Confederacy of the lower Chesapeake remained, due primarily to exposure to the European powers, which brought the ravages of disease, depletion of game, and increased warfare to North America.[8] The Mattaponi are descendents of the tribes that once constituted the Powhatan Confederacy and have settlements along the Mattaponi River.[9]

The English, in contrast, enjoyed comparative prosperity in Virginia during the latter part of the seventeenth century with nearly 30,000 inhabitants and enjoying frequent land acquisitions.[10] Despite this significant population growth, Virginia as a society remained developmentally stunted.[11] Wars with the Dutch, royal indebtedness, the stirrings of revolution in Britain, an entrenched colonial government, and an average of four to six times as many men as women in the colony made for a volatile environment.[12] What growth the British had sustained resulted from a lasting peace in the colony since 1646, when the royal governor removed all indigenous inhabitants from the Jamestown Peninsula in an effort to insulate the British from the native populations.[13] This period of peace came to a close, however, as the British expanded beyond the pale of the Jamestown peninsula and once again made contact with the tribes of the former Powhatan Confederacy.[14]

By the summer of 1676 rebellion had shattered the tenuous peace. Nathaniel Bacon, a disenchanted colonist, exploited and fostered the fears and prejudices of former indentured servants who were finding that the op-

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[7] MIDDLETON, *supra* note 2, at 28.

[8] *Id. supra* note 2, at 319, 314.

[9] The Commonwealth of Virginia "observes a guardian-ward relationship with the Mattaponi, pursuant to which it established a State reservation . . . title to which Virginia holds in trust for the beneficial use and occupancy of the Mattaponi." *See* 1976–77 Op. Va Att'y Gen. 107, 107–09; 1917–18 Op. Va Att'y Gen. 160, *cited in* Brief of the State Respondents in Opposition to the Petition for a Writ of Certiorari at 4, Mattaponi Indian Tribe v Virginia 126 S. Ct. 2862 (2006) (No. 05-1141). Although Virginia does recognize the Mattaponi as a Native American tribe for purposes of state law, it does not accept that the tribe, as it exists, stands as successors in interest to the Treaty of Middle Plantation. *Id.* at 4, 14.

[10] *See* EDMUND S. MORGAN, AMERICAN SLAVERY—AMERICAN FREEDOM 244–45 (1995) (1975) (estimating that population on the Northern Neck had grown to 6,000 persons or approximately 19% of Virginia's total European population).

[11] *See* MIDDLETON, *supra* note 2, at 130–133 (laying out the various setbacks the colony experienced in the 1660s and 1670s).

[12] *Id.*

[13] *Id.* at 133.

[14] *See id.* (discussing the atmosphere leading up to Bacon's Rebellion).

portunities to acquire fertile land were not as plentiful as they had been told before leaving England. Bacon drew these poor and discontented colonists to his side with promises of land—land that he intended to wrench from the hands of the "barbarous heathen."[15] Bacon leveled several charges against the royal governor in a declaration on July 30, 1676, but what is striking about his complaints against the governor is the focus upon the Native Americans as being the central problem of colonial Virginia.[16] Bacon accused Governor Berkeley of maintaining a monopoly on the beaver trade in favor of the Native Americans rather than the loyal subjects of the crown.[17] He further alleged that the governor had "protected, favored, and emboldened the Indians against his Majesty's loyal subjects, never contriving, requiring, or appointing any due or proper means of satisfaction for their many invasions, robberies, and murders committed upon [the British]."[18] Bacon's conception of the Native Americans as being the true obstacle to the success of his followers resulted in violent confrontations between the various tribes in Virginia and the colonists, affecting even those tribes that had been friendly towards the British.[19]

Despite initial intensity, Bacon's Rebellion quickly faded after Bacon's illness and death in October of 1676.[20] Without his charismatic, unifying influence the Rebellion faltered and was followed by several months of chaos in the colony.[21] Unfortunately, despite the relatively short life of the Rebellion, the British faced a substantial challenge in restoring the tenuous calm that had preceded the violence.[22]

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[15] *Declaration of Nathaniel Bacon in the Name of the People of Virginia* (July 30, 1676) *reprinted in* 3 FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 1783–4 (W. Keith Kavenagh ed., 1973), *cited by* MIDDLETON, *supra* note 2, at 136.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See* MIDDLETON *supra* note 2, at 137.

[20] *Id.* at 137.

[21] *Id.*

[22] Bacon's Rebellion occurred during and aided in a major shift in colonial history. *Id.* at 138. As of 1660 it had finally become more economically advantageous for planters to transition from indentured servitude as the primary source of labor in the colony to institutionalized race-based slavery. MORGAN *supra* note 10, at 299; MIDDLETON *supra* note 2, at 138–39. This shift in labor systems resulted from several factors, but what can be definitively stated is that this transition marked the true emergence of institutionalized racism in the New World, an emergence which would further complicate relations between the Native Americans and the British. *See* MORGAN *supra* note 10, at 327–28 (Discussing race prejudice before and after Bacon's Rebellion, Morgan posits that institutionalized racism may have been conceived of as a way to prevent poor whites and blacks from uniting against their wealthy neighbors. Morgan points out that one of the final groups that disbanded was, in fact, a mixed band of eighty Africans and twenty English servants, a dangerous warning of class, rather than racial warfare.); *see also* MIDDLETON, *supra* note 2, at 138 (discussing the scho-

THE TREATY OF MIDDLE PLANTATION

Having quelled the colonists' revolt, the British quickly began mending relations with the Native American tribes. The Treaty of Middle Plantation, executed on behalf of King Charles II with the remaining tribes of the Powhatan Confederacy, resulted from this attempt to bring order back to the colonies and restore peace with the Native Americans. Few Native American settlements remained in colonial Virginia in the aftermath of the Rebellion, and the few that did remain were weary from years of warfare with the British and other Native American tribes. The British maintained that the Treaty would provide the tribes with certain lands and rights similar to those enjoyed by the colonists.[23] The Treaty held that the "Indian Kings and Queens" would "henceforth acknowledge to have their immediate Depenency [sic] on, and own [sic] all Subjection to the Great King of England."[24] In addition to recognizing the King of England as their overlord, the Native American signatories of the Treaty were required to convey "Three *Indian* Arrows" per year in lieu of quit rent,[25] as well as a tribute of twenty beaver skins to the governor as evidence of their "Obedience to the Right Honourable [sic] His Majesties Governour [sic] . . . in acknowledgement [that] they hold their Crowns and Lands of the Great King of *England*."[26] The payment of tribute to the King's governor created a guardian-trust relationship between the tribes of the Powhatan Confederacy and the British Empire.[27] This relationship relieved the tribes of some of the vestiges of their sovereignty in return for peace and the protection of the more powerful British Empire. In return for the Native American's promises of fealty, the British guaranteed them "land sufficient to plant upon." This provision indicates a desire by the English, at least on the face of the Treaty, to deal fairly with the Native Americans to achieve a lasting peace.

Additionally, the tribes received a guarantee that to preserve peace, "no *English* shall Seat or Plant nearer then [sic] three miles of any *Indian* Town; and whosoever hath made, or shall make any Incroachment [sic] upon their Lands, shall be removed from thence, and proceeded against as

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larly debate on the significance of Bacon's Rebellion as a transition of Virginia from a frontier society to a slave society).

[23] MIDDLETON, *supra* note 2, at 319.

[24] Treaty of Middle Plantation, art. I (1677), *in* 4 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789 82 (Alden T. Vaughan & W. Sitt Robinson eds., University Publications of America, Inc. 1983).

[25] *Id.* at 83, art. II. Quit rent is "[a] payment to a feudal lord by a freeholder or copyholder, so called because upon payment the tenant goes 'quit and free' (discharged) of all other services." BLACK'S LAW DICTIONARY 1283 (7th ed. 1999) (1891).

[26] *Id.* at 85, art. XVI (emphasis in original).

[27] *See id.* (discussing how the Native Americans hold their crowns and lands at the pleasure of King of England).

by the former Peace made."[28] While the guarantee of sufficient land to plant on does not contain any reference to specific lands, this clause provides for the protection of an identifiable parcel of land surrounding the site of the traditional tribal village. Furthermore, the members of the confederacy were also allowed to

> enjoy their wonted conveniences of Oystering, Fishing, and gathering Tuchahoe, Curtenemons, Wild Oats, Rushes, Puckoone, or any thing else (for their natural support) not useful to the *English*, upon the *English* Dividends; Always provided they first repair to some Publick[sic] Magistrate of good Repute, and inform him of their number and business, who shall not refuse them a Certificate upon this or any other Lawful occasion.[29]

This passage stands at the center of the modern litigation in the *Mattaponi* case because the construction of the reservoir may detrimentally affect the Tribe's North American shad hatcheries on the banks of the Mattaponi River. Destruction of the shad's ecosystem would endanger the Tribe's traditional method of sustaining itself, thereby raising the question of whether or not the construction of the reservoir violates the terms and intents of the Treaty.[30] The Treaty further provides that should any of the rights and promises made to the tribes be breached, or should they suffer any other injuries at the hands of the English, their first course of action would be to the governor "who will Inflict such Punishment on the willful Infringers hereof as the Laws of England or this Countrey [sic] permit, and as if such hurt or injury had been done to any *Englishman*."[31] This provision provides the tribe's only recourse in the event of a breach of the Treaty.

Facially this arrangement benefited the Mattaponi immensely. The Powhatan Confederacy, weakened by years of warfare, disease, and increasingly scarce natural resources, likely assented to the Treaty at Middle Plantation to insulate themselves against further British encroachments and preserve what remained of their heritage and traditional way of life.[32] Unfortu-

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[28] *Id.* at 83, art. IV (emphasis in original).

[29] *Id.* at 84, art. VII (emphasis in original). The shad is a flavorful fish that populates the tidal waters along the east coast of the United States. It plays a particularly important role in Virginia politics when, during an election year, candidates, campaign workers, and other political figures gather in Wakefield, VA for a shad planking, a picnic comparable to a New England clambake.

[30] Petition for a Writ of Certiorari, *supra* note 3, at 7.

[31] Treaty of Middle Plantation, art. V (1677), *in* 4 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789 83–84 (Alden T. Vaughan & W. Sitt Robinson eds., 1983) (emphasis in original).

[32] *See* MIDDLETON, *supra* note 2, at 319 (discussing the devastating impact British settlement and Bacon's Rebellion had on the tribes of the Powhatan Confederacy); MORGAN, *supra* note 11, at 252 (discussing how the Native Americans of Virginia were hardly a threat to the British presence in Virginia).

nately, the magnanimous impulses of the British, which are apparent even to a disinterested eye, remained hardly more than empty words.[33] The Treaty ultimately proved to be little more than a cessation of open hostilities and many of the Native Americans' rights were effectively revoked soon after.[34] In 1691, the Virginia legislature, in its progression toward the implementation of institutionalized racism, forbade the intermarriage of Native American and British persons, and by 1705, banned Native Americans from testifying in court.[35] This prohibition of Native American testimony in colonial courts leaves one wondering whether or not Native Americans could have even attempted to seek enforcement of the Treaty of Middle Plantation after 1705.

By the end of the seventeenth century, the Native Americans of Virginia, including the Mattaponi, were a broken people. Their remaining rights were set to paper, a foreign invention, in English, a foreign language, and were enforceable only at the pleasure of the Governor, a foreign overlord. In effect, the Treaty of Middle Plantation served only to end open hostilities so that the British could continue their project of subjugation.

THE CASE AT BAR: *MATTAPONI INDIAN TRIBE V. COMMONWEALTH OF VIRGINIA*

In 1987, the cities of Newport News and Williamsburg, as well as York County, commissioned the Regional Raw Water Study Group (Study Group) to examine the water needs of the Lower Peninsula region of southeastern Virginia.[36] The Study Group estimated that the population of the region would grow by nearly 236,000 people by 2040—a greater than one-third increase in population—resulting in a projected water deficit for the three localities of approximately 39.8 million gallons per day.[37] As a result, the Study Group identified thirty-one different options to alleviate this impending problem, but concluded that the best solution would be the implementation of new water conservation measures and use restrictions, the de-

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[33] *See* MIDDLETON, *supra* note 2, at 319 ("The formerly proud peoples of the Powhatan Confederacy, the Chickahominy, Mattaponi, Pamunkey, Nanesmond, and Paspahegh were reduced to a handful of families amounting to just five percent of their earlier population. A treaty [the Treaty of Middle Plantation] signed in the aftermath of Bacon's Rebellion supposedly guaranteed them certain lands and rights similar to those enjoyed by the colonists. But, as in Massachusetts, their lands were slowly encroached upon by whites, confining them to a few small enclaves.")

[34] *See id.*

[35] *Id.*

[36] Alliance to Save the Mattaponi v. Virginia Dept. of Envtl Quality *ex rel.* State Water Control Bd., 621 S.E.2d 78, 83 (Va. 2005).

[37] Brief of the State Respondents in Opposition to the Petition for a Writ of Certiorari *supra* note 9, at 5, note 7.

velopment of fresh groundwater sources, and the construction of the King William Reservoir.[38] By 1993 the City of Newport News, acting as the lead "locality" in the Study Group, filed an application for a permit to build the proposed reservoir on Cohoke Mill Creek with a "pumpover" from the Mattaponi River.[39] This pumpover would have the capacity to draw seventy-five million gallons of water per day from the Mattaponi River and store it in the new reservoir. The extensive project calls for various pipelines and the impoundment of 1,526 acres of land.[40] The new reservoir would supply water to the residents of the cities of Newport News, Hampton, Poquoson, and Williamsburg, as well as the Counties of James City, King William, New Kent, and York.[41]

Because the reservoir will be constructed by "discharge of dredged or fill material" into the creek, the municipalities needed a construction permit from the United States Army Corps of Engineers.[42] That permit, however, could not be issued unless "a certification from the State in which the discharge originates or will originate" is provided.[43] As a result, the City of Newport News applied to the State Water Control Board of Virginia for a Virginia Water Protection Permit.[44] The State Water Control Board issued the permit in 1997 despite evidence that the flooding resulting from the construction of the reservoir would cause substantial environmental damage.[45]

The proposed project drew fire from various environmental organizations, riparian landowners on the affected rivers and creeks, and the remaining members of the Mattaponi Tribe.[46] Proving injury as a result of the issuance of the permit was difficult, however, for several of the larger and better-organized groups of petitioners, as many of them did not own property that would be impacted by the project. As a result, the possibility of a treaty violation presented one of the strongest arguments challenging the project.[47] Unfortunately for the Mattaponi and the various other citizens

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[38] Mattaponi Indian Tribe v. Virginia Dept. of Envtl. Quality, *ex rel.* State Water Control Bd., 601 S.E.2d 667, 696 (Va. Ct. App. 2004).

[39] *Id.* at 696–697.

[40] Brief of the State Respondents in Opposition to the Petition for a Writ of Certiorari, *supra* note 9, at 5, n. 7.

[41] Brief for Appellees at 4, Alliance to Save the Mattaponi v. Virginia *ex rel.* State Water Control Bd., 519 S.E.2d 413 (Va Ct. App. 1999) (Record Nos. 2310-98-1).

[42] *See* 33 U.S.C. § 1344(a), § 404 (2000); Alliance to Save the Mattaponi v. Virginia, *ex rel.* State Water Control Bd. 519 S.E.2d 413 (Va Ct. App. 1999).

[43] 33 U.S.C. §1341(a) (2000).

[44] Alliance to Save the Mattaponi,v.Virginia Dept. of Envtl. Quality, 519 S.E.2d at 414–15.

[45] *Id.* at 415.

[46] *Id.*

[47] *Id.*

interested in forestalling this project, these treaty claims are nebulous and resolving them has proved an immensely contentious battle.

The Tribe appealed the decision of the State Water Control Board to the Circuit Court of Newport News and asserted treaty claims of freedom from encroachment and protection of their fishing and gathering rights.[48] The creation of the pumpover from the Mattaponi River to the proposed reservoir on Cohoke Mill Creek would draw enough water from the river to threaten the survival of the North American shad, and thus endanger the survival of the Tribe's hatchery and traditional fishing practices.[49] Furthermore, the creation of the reservoir would flood lands within the three-mile radius of the traditional town of the Mattaponi.[50]

On appeal, the Tribe argued that the Commonwealth is bound by the terms of the Treaty under the Supremacy Clause of the United States Constitution.[51] The case reached the Virginia Supreme Court twice.[52] On the first appeal, the court ruled that the Mattaponi Tribe had standing to assert its claims, as it is a sovereign with justiciable interests that could be injured by the proposed reservoir project.[53] The court remanded the case to the Circuit Court of Newport News.[54] On remand, the circuit court dismissed the majority of the Tribe's claims and ruled that the Treaty arose under Virginia law and not under federal law.[55]

After the circuit court found that the Treaty arose under Virginia law, the Mattaponi appealed the issue to the Virginia Court of Appeals.[56] The Court of Appeals determined that it lacked jurisdiction to hear the treaty claims and transferred those claims to the Virginia Supreme Court.[57] The Tribe once again presented its arguments that Virginia is bound by the Treaty under the Supremacy Clause of the United States Constitution and that the circuit court erred in holding otherwise.[58] Nevertheless, the Virginia Supreme Court affirmed the circuit court's finding, approving Virginia's argument that as the Treaty was entered into before the ratification of the Constitution, it could not have been made under the authority of the United

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48 Petition for Writ of Certiorari *supra* note 3, at 7.

49 *Id.*

50 *Id.*

51 *Id.*

52 Mattaponi Indian Tribe, 541 S.E.2d 920 (Va. 2001); Alliance to Save the Mattaponi, 519 S.E.2d at 415.

53 Petition for a Writ of Certiorari, *supra* note 3, at 7.

54 *Id.*

55 Mattaponi Indian Tribe, 541 S.E.2d 920.

56 Petition for a Writ of Certiorari, *supra* note 3, at 7.

57 Mattaponi Indian Tribe, 601 S.E.2d 667, 667 (Va. Ct. App. 2004).

58 Alliance to Save the Mattaponi v. Virginia Dept. Envtl. Quality *ex rel.* State Water Control Bd., 621 S.E.2d at 93.

States.[59] The Virginia Supreme Court further agreed that because the Senate never ratified the Treaty pursuant to Article 1, Section 10 of the Constitution, the only law under which the Treaty may be enforceable is Virginia law.[60] Finally, the Virginia Supreme Court found that, absent a waiver of sovereign immunity issued by the Virginia General Assembly, the Commonwealth is immune from both suits for damages and suits in equity to restrain or compel governmental action.[61] The court then remanded the case for trial on the merits of the Tribe's treaty claims against the City of Newport News and the State Water Control Board.[62] Regardless of this, the court's decision regarding the enforceability of the Treaty of Middle Plantation is final to the Mattaponi in all respects, thereby leaving the Tribe to fight a virtually impossible battle.[63]

As a result, the Tribe appealed the decision to the United States Supreme Court.[64] In its petition for a writ of certiorari, the Tribe asserted that the decision contradicts the Constitution's structure of government, the doctrine of universal succession, and the jurisprudence of the Supreme Court.[65] Furthermore, the Mattaponi claimed that the decision stood in opposition to the centuries-old tradition that Native American affairs are matters of federal law.[66] Despite significant support for these arguments, the Supreme Court denied the petition and the case has since proceeded against the City of Newport News and the State Water Control Board, but has not yet been concluded.[67]

The arguments in support of the Mattaponi's position are intriguing, and upon closer evaluation present a reasonable basis for finding that pre-revolutionary treaties with Native American tribes are, in fact, enforceable under the Supremacy Clause. To make this argument, however, discussion must begin with the emergence of the United States from the British Empire.

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[59] *Id.* at 94.

[60] *Id.*

[61] *Id.* at 96.

[62] *Id.* at 98.

[63] Petition for Writ of Certiorari, *supra* note 3, at 11.

[64] *Id.*

[65] *See generally, id.* (presenting arguments in favor of issuing a writ of certiorari).

[66] *Id.* at 17.

[67] Mattaponi Indian Tribe, 126 S. Ct. at 2862. Since this paper was written the Tribe's treaty claims Newport News and the State Water Control Board have survived motions of demurrer and summary judgment. Mattaponi Indian Tribe v. Virginia, 72 Va. Cir. 444 (trial order) (2007).

THE DAWN OF A REPUBLIC: THE ARTICLES OF CONFEDERATION

Despite significant disadvantages, several Native American tribes managed to manipulate the colonial powers' rival interests expertly during the seventeenth and eighteenth centuries.[68] The Iroquois, for example, were especially adept at manipulating French, Dutch, and English interests to secure for themselves significant power, despite their comparative weaknesses in technology and population.[69] For example, at the onset of the Seven Years War the Iroquois indicated favoritism for the French, but ultimately aligned with the British in exchange for the promise that no British subjects would be permitted to settle on Iroquois lands and hunting grounds west of the eastern mountains.[70] With Iroquois support, the British won the Seven Years War and effectively ejected France from North America, and the Iroquois then stood in a stronger political position vis-à-vis the British.[71]

The British realized, particularly after the Seven Years War, that the most effective way to manage Native American affairs was under the central authority of the Crown rather than through the various local colonial governments.[72] Warfare and general chaos between the colonists and the Native Americans necessitated this centralization of power over Native American affairs.[73] The Crown issued a Royal Proclamation on October 7, 1763 that recalled all settlers from Native American lands and forbade any future emigration until further notice was issued.[74] The proclamation also mandated that only licensed government agents could trade with the Native Americans.[75] Most importantly, however, the Crown retained full and exclusive authority to make treaties with the Native Americans.[76] This stands as an example of the emerging tradition in the New World of centralized control over Native American affairs. This trend, although questionably supported by the Articles of Confederation, would find new life with the adoption of the Constitution.

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[68] MIDDLETON, *supra* note 2, at 330.

[69] *Id.*

[70] DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 58 (5th ed. 2005).

[71] *Id.*

[72] Petition for Writ of Certiorari, *supra* note 3, at 17.

[73] Petition for Writ of Certiorari, *supra* note 3, at 17. *See, e.g.*, Royal Proclamation, Oct. 7, 1763, *reprinted in* COLONIES TO NATION 1763–1786: A DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION 16–18 (Jack P. Greene ed., 1975).

[74] *Id.*

[75] *Id.*

[76] *See* Wilkins, *supra* note 4, at 291–92 ("[T]reaties negotiated between Britain and the British colonies with Indian tribes...generally centered on the establishment of peace and friendship, alliance, trade, return of captives or exchange of hostages, boundary establishment or revision, or land cessions.").

With the onset of the Revolution and the establishment of the United States under the Articles of Confederation, Native Americans were faced with a new entity that threatened to deprive them of their power to manipulate and foster the inherent jealousies among the colonial powers. During the Revolution many Native American tribes aligned with the British, and achieving peace with these tribes proved challenging for the fledging government.[77] The Iroquois in the North and the Cherokees, Creeks, and Chickasaw in the South were particularly troublesome to the newly independent colonies, necessitating action by the fledgling government.[78] The Continental Congress responded in 1775 by creating three departments for Indian affairs, each focused on a different geographical region.[79] The importance of improving relations with the Native American tribes at this time is clearly evidenced by the brain trust of commissioners assigned to the middle department, including Benjamin Franklin, Patrick Henry, and James Wilson.[80] These commissioners were empowered to treat with the Native Americans "in the name and on behalf of the united colonies."[81]

When the Continental Congress took up the Indian question in drafting the Articles of Confederation in 1776, they disagreed over the scope and authority of the central government over Indian affairs.[82] Many states were concerned about centralized control over Indian affairs, fearing that it would constitute a limit on the State's ability to govern effectively. Virginia was particularly concerned over the control of the tributary tribes within its borders—including the Mattaponi—and wanted some guarantee that it would be able to manage its own Native American affairs.[83] Other delegates disagreed with Virginia's position. James Wilson of Pennsylvania argued in Congress that "[w]e have no rights over the Indians, whether within or without the real or pretended limits of any Colony. They will not allow themselves to be classed according to the bounds of Colonies."[84] Wilson recognized that the most effective way of dealing with these quasi-sovereign peoples would be with a uniform policy invoked by the central government. The compromise reached and laid down in the Articles of Con-

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[77] *See* FRANCIS PAUL PURCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF POLITICAL ANOMALY 24–27 (1994).

[78] *Id.* at 26.

[79] *Id.* at 27, *citing* 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 175 (Worthington C. Ford ed., 1904–37).

[80] *Id.*

[81] *Id.*

[82] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 21 (Nell Jessup Newton ed., 2005).

[83] *Id.*

[84] 6 J. CONTINENTAL. CONG. 1077 (1776), *quoted in* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 82, at 21.

federation was, in the words of James Madison, "obscure and contradictory."[85] The relevant Article holds that

> [t]he United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States provided that the legislative right of any State within its own limits be not infringed or violated.[86]

This provision in the Articles illustrates the disagreement among members of the Continental Congress over the resolution of the Indian question. In form, it divides the right to manage Native American affairs between the states and the central government. In doing so, however, the clause fails to delineate what constitutes membership in a state and which legislative rights are protected.[87] In effect, this provision created more confusion over Native American affairs than it resolved. As a result, the Mattaponi continued to pay tribute to the new American governors of Virginia, and Virginia thus became the successor in interest to Britain's treaty with the Mattaponi.[88] Virginia Attorney General Troy issued an official opinion on the Treaty of Middle Plantation in 1977 stating that:

> To interpret the rights in land confirmed by the treaty [of Middle Plantation], one must examine the rights in real property then recognized by Great Britain, the prior sovereignty which governed the land in Virginia. It has been the policy of the United States to respect these previously recognized rights, based upon principles of international law.[89]

As a result, Virginia argues today that the Treaty of Middle Plantation, if enforceable, is so only under the jurisdiction of the Commonwealth of Virginia and not at the federal level.

The Mattaponi interpret the Articles more narrowly, however, than some scholars have. In their filing for a writ of certiorari before the United States Supreme Court, they claim that "the drafters of the Articles of Confederation also sought to prevent conflict with Indians by vesting Congress with the exclusive power to "'enter[] into treaties and alliances' and to 'regulat[e] the trade and manag[e] all affairs with the Indians.'"[90] The Mattaponi ignore this admittedly cryptic clause preserving any of the State's legislative rights with regards to Native American affairs and instead focus on a holding from the Second Circuit concluding "that [the Articles of Confe-

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85 THE FEDERALIST No. 42, at 306 (James Madison) (B.F. Wright ed., 1961).

86 U.S. ART. OF CONFEDERATION, art. IX (1777).

87 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 82, at 21.

88 1976–77 Va. Op. Atty. Gen. 107.

89 *Id.*

90 Petition for Writ of Certiorari, *supra* at note 3, at 18.

deration] did not give the states any power to make treaties of war and peace with the Indians."[91]

The confusion over the boundaries of state and federal power under the Articles appeared to be resolved, however, with the adoption of the new Constitution in 1789, which removed all references to state power in Native American affairs.[92] As a result, the Mattaponi countered Virginia's argument that the Treaty of Middle Plantation is enforceable only under Virginia law with the proposition that the adoption of the Constitution, with its new treatment of Native Americans, implies that the new federal government took up the obligations of the British under the treaty as the successor to all British claims and obligations in the former colonies.[93]

THE CONSTITUTION AND NATIVE AMERICAN AFFAIRS

The adoption of the Constitution in 1789 fundamentally transformed the ways in which relations with Native American tribes were administered.[94] Although several states maintained treaties executed on their own behalf with tribes within their borders from before the ratification of the Constitution, the new governing system left all future actions concerning the Native American tribes within the purview of the federal government.[95] There was hardly any debate on the "Indian question" during the Constitutional Convention of 1787.[96] Nonetheless, the lack of debate has been interpreted to indicate "a sign of agreement within the convention that Indian affairs should be left in the hands of the federal government."[97]

The first reference to the "Indian question" resolved the issue of whether Native American tribes are subjects of the states they inhabit.[98] The

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[91] Petition for Writ of Certiorari, *supra* at note 3, at 18, *citing* Oneida Indian Nation of New York v. New York, 860 F.2d 1145, 1154 (2d Cir. 1988).

[92] *Id.* at 22.

[93] *Id.* at 12–14.

[94] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 83, at 25. ("Madison's intent to end state encroachments on federal authority, and contemporary state interference with federal Indian policy, all contribute to the understanding of the Indian commerce clause as a broad grant of power to the federal government and a limit on state power to interfere with federal Indian policy.").

[95] *Id.* James Madison remarked that "[b]y the Federal Articles, transactions with the Indians appertain to Congress, yet in several instances the States have entered into treaties and wars with [Native American tribes]." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 316 (Max Farrand ed., 1911). In this particular case, Madison was referring to Georgia. FRANCIS PAUL PURCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 68, n. 1 (1994). Additionally, New York had treated with the Six Nations of the Iroquois during this period. *Id.* at 38.

[96] *Id.* at 68.

[97] *Id.*

[98] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 82, at 25.

resolution came in James Wilson's proposal that the count of state residents for purposes of determining representation and the apportionment of direct taxes not include "Indians not paying taxes in each State."[99] The ultimate language in the Constitution became "Indians not taxed,"[100] and was accepted without debate, indicating the general acceptance that Native American tribes carried a special status in the United States.[101]

The new Constitution embodied the idea that the federal government would wield substantial, if not complete, control over Native American affairs in what is commonly referred to as the Indian Commerce Clause.[102] This clause holds that "Congress shall have Power To . . . regulate Commerce . . . with the Indian Tribes."[103] The prior drafts of this clause began with the exceptionally broad power "[t]o regulate affairs with the Indians as well within as without the limits of the United States."[104] This was limited by the Committee on Detail, which added to the clause granting Congress the power "to regulate commerce with foreign nations, and among the several States" the words "and with Indians, within the Limits of any State, not subject to the laws thereof."[105] This amendment to the Commerce Clause was subsequently reduced to just "and with the Indian tribes."[106] This curtailment of the proposed amendment indicates a desire of the delegates to provide very broad power to the federal government over Native American affairs; the wording was accepted without debate.[107] Thus, the general impetus to read the Commerce Clause broadly in favor of federal involvement, coupled with the fact that Indian tribes are enumerated as a specific group that the federal government has special commerce power over, effectively relieves the states of any obligation or right to manage the affairs of Indian tribes within their borders.[108]

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99 *Id.*

100 U.S. CONST. art. I, § 2, cl. 3.

101 *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 82, at 24.

102 U.S. CONST. art. I, §8, cl. 3.

103 *Id.*

104 Federal Convention Journal Entry (Aug. 18, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 321 (Max Farrand ed., rev. ed. 1937). *See* PURCHA, *supra* note 77, at 68.

105 Federal Convention Journal Entry (Aug. 22, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 367 (Max Farrand ed., rev. ed. 1937). *See* PURCHA, *supra* note 77, at 68–69.

106 Federal Convention Journal Entry (Sept. 4, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 493, 497 (Max Farrand ed., rev. ed. 1937). *See* PURCHA, *supra* note 77, at 69.

107 *Id.* at 495, 499. PURCHA, *supra* note 77, at 69.

108 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 82, at 25.

The proposition that management of Native American affairs is firmly within the purview of the federal government enjoys support from various sources. For example, many interactions, at least until 1871,[109] between the United States and its resident Native American tribes had been governed by treaties, which are only within the power of the federal government to create and ratify.[110] This indicates that the generations of politicians following ratification of the Constitution understood Native American affairs to be properly dealt with similarly to international affairs, a preserve of federal power.[111] James Madison, a leading drafter of the Constitution, pointed to problems arising from a lack of centralization with regard to treaty-making under the Articles, while debating the adoption of the Constitution in 1787:

> Will it prevent encroachments on the federal authority? A tendency to such encroachments has been sufficiently exemplified, among ourselves, as well [as] in every other confederated republic ancient and Modern. By the federal articles, transactions with the Indians appertain to Congs. Yet in several instances, the States have entered into treaties & wars with them. In like manner no two or more States can form among themselves any treaties &c. without the consent of Congs. Yet Virga. & Maryd. in one instance-Pena. & N. Jersey in another, have entered into compacts, without previous application or subsequent apology.[112]

In this commentary, Madison illustrated the problems that arose under the Articles in allowing States to negotiate treaties with Native Americans and other states.

President Washington embraced the view that the federal government exercised complete control over Native American affairs in his explanation of the importance of the Indian Commerce Clause to Corn Planter, Chief of the Senecas, who was concerned about state purchases of Indian lands.[113] Washington declared, "the Case is now entirely altered. The General Government only has the Power to treat with the Indian Nations . . . No State, nor Person, can purchase your Lands, unless at a general Treaty, held under the Authority of the United States."[114] Washington's assurances indi-

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[109] *Id.* at 26. Congress outlawed the making of treaties with Native American tribes in 1871. *See* Act of Mar. 3, 1871 §1, 16 Stat. 544 (codified at 25 U.S.C. § 71).

[110] U.S. CONST. art. II, §2, cl. 2.

[111] *Id.*

[112] DEBATES IN THE FEDERAL CONVENTION, *in* JOURNAL OF THE CONSTITUTIONAL CONVENTION, KEPT BY JAMES MADISON (E.H. Scott ed., 1893) [hereinafter DEBATES IN THE FEDERAL CONVENTION]..

[113] CASES AND MATERIALS ON FEDERAL INDIAN LAW, *supra* note 70, at 62.

[114] *Id.* Subsequent Supreme Court cases have held, however, that lands purchased by the States prior to the adoption of the Constitution are immune from the Indian Commerce

cate a change in the way Native American affairs would be handled in the United States, particularly regarding land rights. Furthermore, his statements show that he understood the Constitution to provide the federal government ultimate authority over Native American affairs.

THE SUPREMACY CLAUSE VERSUS THE TREATIES CLAUSE

Several clauses in the United States Constitution address treaties under the new form of government. Article VI establishes the legal extent of the Constitution.[115] It also resolves the status of all debts and engagements incurred and entered into before the adoption of the Constitution.[116] In short, this article adopts all of the treaty obligations that the nation was subject to under the Articles of Confederation, but it does not speak of treaties the United States may have succeeded to. Article VI continues on proclaiming that:

> The Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.[117]

The Mattaponi invoke the Supremacy Clause, claiming that all treaties are the "supreme law of the land," and thus Virginia may not decree that the Commonwealth enjoys sovereign immunity from the provisions of the Treaty of Middle Plantation.[118]

Admittedly, this argument faces some serious challenges, the most notable of which is the Treaties Clause, which holds that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[119] Until the 1870s, the negotiation and ratification of treaties with Native American tribes by the federal government was a common method of dealing with issues arising between the tribes and the people of the United States.[120]

Virginia rests its argument that the Treaty of Middle Plantation does not fall within the purview of the Supremacy Clause on the assertions that the Mattaponi are not a "federally recognized" Native American Tribe and

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Clause. *See* Oneida Indian Nation v. New York, 860 F.2d 1145 (2d Cir. 1988) (holding that Articles of Confederation permitted New York to purchase Indian lands).

115 U.S. CONST. art VI, cl. 1.

116 *Id.*

117 U.S. CONST. art. VI, cl. 2.

118 Alliance to Save the Mattaponi v. Virginia 270 Va. 423, 450-51 (2005).

119 U.S. CONST. art. II, §2, cl. 2.

120 *See supra* note 109.

that the Senate never ratified the Treaty.[121] Virginia's arguments are flawed, however. First, there is case law supporting the proposition that treaty rights of tribes that are not recognized by the federal government may be enforced,[122] including rights of tribes that had enjoyed recognition and have since lost it.[123] Second, there is a viable argument that as the framers intended the newly organized federal government to have complete control over Native American affairs, then they also intended pre-existing treaties with Native American tribes to become binding as the "supreme law of the land," as the treaties executed under the Articles had been.[124] Finally, returning to the issue of federal recognition, such recognition or lack of recognition would be rendered irrelevant if the Treaty enjoys status as being the "supreme law of the land." This is because federal recognition is a prerequisite that has developed since both the creation of the Treaty of Middle Plantation and the United States' succession to the British interest in that Treaty. Thus, requiring federal recognition of the Mattaponi for the Treaty of Middle Plantation to be enforceable does not make sense because formal federal recognition was not a prerequisite to the formation of treaties at the time when the United States would have acceded to the Treaty of Middle Plantation.

Regardless of these arguments, Virginia maintains that the Treaty is enforceable only under Virginia law, and that the common law doctrine of sovereign immunity prevents even that. Accepting such an argument would do a great injustice to the jurisprudence of the Supreme Court and serve only to distort and devalue the Supremacy Clause.[125] In *United States v. Pink*, the Supreme Court held that "state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement."[126] This holding was explicitly extended to treaties made with Native American tribes in *Antoine v. Washington*, which held that a state statute that conflicted with rights guaranteed by a Native American Treaty was unenforceable with regard to those rights because it conflicted with the Supremacy Clause.[127] *Antoine* placed treaties with Native

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121 Brief of the State Respondents, *supra* note 9, at 3.

122 *See* United States v. Washington, 520 F.2d 676, 692–93 (9th Cir. 1975) (holding that the Stillaguamish Tribe has vested rights under Treaty of Point Elliott even though the Tribe is not officially recognized by the federal government).

123 Menominee Tribe v. United States, 391 U.S. 404, 412–13 (1968).

124 *See* "Theories of State Succession," *infra* pp. 916–19. This section contends that the founders would have understood preexisting treaties with Native American tribes within the colonies to have still been in effect as a result of the application of the universal theory of state succession to treaties.

125 Petition for Writ of Certiorari, *supra* note 3, at 15.

126 United States v. Pink, 315 U.S. 203, 230–31 (1942).

127 Antoine v. Washington, 420 U.S. 194, 205 (1975).

Americans on the same level as those entered into with foreign states as being "the supreme law of the land."[128]

The Mattaponi argue that allowing the common law of sovereign immunity to trump the Treaty of Middle Plantation would leave the treaty with less force than a common contract.[129] The Restatement (Second) of Contracts holds that "ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract."[130] Under Virginia's argument of sovereign immunity, however, the Mattaponi are denied even this protection of their expectations. Virginia carries the contract analysis of the Treaty further, arguing that the Mattaponi's claims should be barred under the doctrine of laches, as they have never—as far as Virginia knows—attempted to enforce any of the provisions of the Treaty previously.[131] This argument is fanciful, at best. In the first place, if the doctrine of laches did apply here, it would seem hardly fair to impose it on the Mattaponi, especially since Native Americans were prohibited from testifying in court in colonial Virginia.[132] Furthermore, the Mattaponi contend that this result—the Treaty amounting to less than a contract—is in direct opposition to *Puyallup Tribe v. Dep't of Game*, which held that construing a "treaty as giving the Indians 'no rights but such as they would have without the treaty' would be 'an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the Nation for more.'"[133] Although this holding rests upon the assumption that the treaty in question is, in fact, enforceable, the requisite enforceability may be found outside the plain meaning of the Supremacy Clause in the theory of universal succession to treaties.

THEORIES OF STATE SUCCESSION

The numerous variations in the creation and destruction of states have resulted in two basic approaches to state succession to treaties.[134] The

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[128] *Id.*

[129] Petition for Writ of Certiorari, *supra* note 3, at 15.

[130] Petition for Writ of Certiorari, *supra* note 3, at 15 *citing* Restatement (Second) of Contracts, 344.

[131] Opposition to the Petition for a Writ of Certiorari, *supra* note 9, at 19. Furthermore, the Mattaponi have continued to pay tribute to the governor of Virginia, as required by the Treaty of Middle Plantation, to the Present day. Petition for a Writ of Certiorari, *supra* note 3, at 5; Opposition to the Petition for a Writ of Certiorari *supra* note 9, at 23.

[132] See *supra* note 35 and accompanying text.

[133] 391 U.S. 392, 397 (1968) (internal citations omitted) *(cited in* Petition for Writ of Certiorarim, *supra* note 3, at 15–16.).

[134] *See* Emanuelli, *supra* note 6, at 1279. *See also* D.P. O'CONNELL, THE LAW OF STATE SUCCESSION 6–9 (H.C. Gutteridge et al. eds., 1956).

universal succession doctrine emerged during the formative years of international law and was inspired by concepts of Roman law discovered during the Renaissance.[135] Under this doctrine, emerging states acceded to the treaty obligations of their parent states.[136] During the nineteenth century, however, scholars began advocating the application of the clean slate doctrine, under which a new state begins life in the international community free from the obligations of its predecessor state.[137] This theory embraced the voluntarist theories of international law that abounded during the nineteenth century.[138] Regardless of this clear historical progression of state succession theory, both of these theories have been applied at various times throughout history.[139] Virginia uses this inconsistency in application to argue that the applicable doctrine of state succession in any case depends upon the context of the emergence of the new state.

These inconsistencies need not, however, be a matter of concern for the Supreme Court in the *Mattaponi* case. When the United States emerged at the end of the eighteenth-century, the "clean slate" approach had not yet entered the arena of international politics.[140] As a result, there was no debate concerning whether to adopt the clean slate or the universal model. Interestingly, in the case of the Louisiana Purchase, the Treaty of 1803 provided explicit provisions governing the succession to treaties concluded by Spain with the Native Americans.[141] This raises the question of whether the silence of the Treaty of Paris on similar issues may be interpreted as a desire by the fledgling United States to escape the obligations of the British vis-à-vis the Native Americans within the United States. Such a position may seem logical to the modern reader, as the Vienna Convention of the Succes-

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135 Emanuelli, *supra* note 6, at 1280.

136 *Id.* at 1279.

137 *Id.* at 1280.

138 *Id.* at 1280. *See* Mathew C. R. Craven, *The Problem of State Succession and the Identity of States Under International Law*, 9 EUR. J. INT'L L. 142, 147–48 (1998).

139 Emanuelli, *supra* note 6, at 1282. For example, the following states followed the principle of universal succession when they went their separate ways: the break-ups of the Greater Columbian Union in 1929, of Norway and Sweden in 1905, of the Austro-Hungarian Empire in 1918, the USSR in 1991 and continuation by Russia, of Yugoslavia in 1991–92, of Czechoslovakia in 1993, and the independence of the British dominions referred to by the Statute of Westminster in 1931. *Id.* Meanwhile, the "clean slate" doctrine was invoked during the separation of Belgium and the Netherlands in 1831, the succession of Finland from the USSR from 1917–1920, the separation of Poland and Czechoslovakia from the Austro-Hungarian Empire in 1918, the Independence of Ireland from 1921–1949, the succession of Pakistan from India in 1947, the creation of Israel from 1947–1949, the succession of Bangladesh from Pakistan in 1971, absorption of the German Democratic Republic by the Federal Republic of Germany in 1990, the independence of the Baltic States in 1991, and the emergence of several newly independent states through decolonization. *Id.* at 1283.

140 *See* Emanuelli, *supra* note 6, at 1280. *See also* Craven, *supra* note 138.

141 *See* Emanuelli, *supra* note 6, at 1284.

sion of States in respect of Treaties, which entered into force in 1996, holds that "newly independent states" do not inherit treaty obligations concluded on their behalf by their predecessors.[142]

Although the clean slate doctrine is now embraced by many nations of the world, including the United States, it would be patently unfair to apply it in the matter at hand. Alexander Hamilton, in *The Federalist No. 84*, invoked Grotius' theory that "states neither lose any of their rights, nor are discharged from any of their obligations, by a change in the form of their civil government."[143] Grotius' theory may be applied to the *Mattaponi* case in two ways. First, it supports the proposition that all treaties executed before American independence remain binding on the United States, regardless of whether or not they have been sanctioned by Congress. Second, it may be construed to support the argument that Virginia's refusal to waive its sovereign immunity is irrelevant. This is because when Virginia, as part of the confederation of colonies, seceded from Great Britain it remained fully bound by the provisions of the Treaty of Middle Plantation as a new sovereign state under the principles of universal succession. As a result, no subsequent enactment of its legislature may justify the abrogation of any provision of the treaty, as it had been fully acceded to as a byproduct of independence.

Virginia argues that allowing universal succession to apply could open a "Pandora's box of claims against the National Government and the States."[144] This argument fails to take into account the body of federal Native American law that has allowed for the abrogation of certain treaty terms by the federal government.[145] Thus, while there may be a number of new claims that may be filed under the principle that pre-revolutionary treaties are enforceable, there remains a means whereby the federal government may control its obligations under those treaties. Virginia also expresses concern over the question of how such a finding may affect the United States' position internationally.[146] The United States is a signatory of the Vienna Convention of the Succession of States in respect of Treaties, which endorses the clean slate doctrine. The Senate has never ratified the Convention, but it is followed by the State Department. Thus, application of the doctrine of universal succession may be construed, as the Commonwealth attempts to do, as conflicting with the State Department's adherence to the Convention.

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[142] Vienna Convention on Succession of States in Respect of Treaties art. 16, Aug. 23, 1978, 1946 U.N.T.S. 3.

[143] Alexander Hamilton, *The Federalist No. 84*, *in* THE FEDERALIST PAPERS 440 (Bucaneer Books, 1992). *See* Petition for Writ of Certiorari, *supra* note 3, at 14.

[144] Petition for Writ of Certiorari, *supra* note 3, at 20.

[145] *See infra* note 179.

[146] Petition for Writ of Certiorari, *supra* note 3, at 20.

Nonetheless, Virginia's concerns over the effect of the Court's sanctioning of the universal theory of succession are overwrought. First, the State Department's sanctioning of the clean slate doctrine does not render it the official policy of the federal government. Second, as the Senate has never ratified the Vienna Convention there is no binding authority requiring the United States to favor one theory over the other. Third, it would be unconscionable to use the clean slate doctrine in evaluating treaty claims that arose before the doctrine had been conceived of.[147] Fourth, it seems likely that the international community would understand the Court's reluctance in sanctioning such a retroactive measure and forgive the momentary break with accepted policy in a very specific and narrow class of situations. Virginia's argument against the application of the doctrine of universal succession rests upon an ill-defined and unsubstantiated fear of "constitutional chaos," and as such provides practically no basis for the Court to reject the doctrine of universal succession as the Mattaponi wish to see it applied in this case.[148]

In light of the fact that the universal succession doctrine was the only theory on the enforceability of a parent state's treaty obligations on a newly independent state in the late eighteenth century, it is possible that the framers accepted the proposition that the Treaty of Middle Plantation is enforceable under the Supremacy Clause. Under the Articles of Confederation, the individual states retained great power over Native American affairs and even freely meddled in international affairs despite limitations on their powers to do so.[149] Thus, Virginia's argument that it stood as successor in interest to the British with regard to the Treaty of Middle Plantation was by the principle of universal succession to treaties under the Articles of Confederation.

The situation changed dramatically, however, with the adoption of the Constitution. Here a new question emerged: Did the adoption of the Constitution constitute an event whereby the federal government became successor in interest to Virginia's obligations regarding Native American affairs? One may look to the writings and debates of the founders on Native American and international affairs for the answer.[150] James Madison certainly opposed the individual States' ability to meddle in Native American affairs.[151] Additionally, the founders determined that treaty-making was

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147 Such a practice would do a disservice to the original signatories of the treaty and their progeny, as they would not have known that their treaty-protected interests were endangered by a newly emerging theory of state succession.

148 *See* PURCHA, *supra* note 77, at 68.

149 *See* note 96.

150 *See supra* pp. 910–13.

151 *See* DEBATES IN THE FEDERAL CONVENTION, *supra* note 112, at 190.

solely within in the power of the federal government.[152] As a result, the Treaty of Middle Plantation ought to be considered binding on the level of government responsible for the management of Native American and international affairs. Furthermore, although the Treaty of Middle Plantation has never been ratified by the Senate, it has been regarded as enforceable by Virginia for centuries and should now enjoy the presumption of supremacy as a result of its historic treatment as a binding treaty.[153] Accepting that the Treaty is enforceable under the Constitution renders irrelevant the issue of whether or not Virginia has waived its sovereign immunity, as the Mattaponi's treaty interests would be a matter of federal rather than state law.

The Supreme Court provided support for the theory of universal succession early on, and thereby the conclusion that the Mattaponi's treaty interests are a matter of federal law, holding that "[t]he United States succeeded to all the claims of Great Britain, both territorial and political . . . ."[154] Included in these claims would be claims of Great Britain that were garnered and protected through treaties with the various Native American tribes. The protection of British, and now American, claims by universal succession of treaties would logically flow both ways. In other words, where the rights of the British transferred to the new American state so did, presumably, their attendant duties. The Court later reiterated this holding stating that "[c]olonies were planted by Great Britain, and the United States, by virtue of the revolution and the treaty of peace, succeeded to the extent therein provided to all the claims of that government, both political and territorial."[155]

Thus the Treaty of Middle Plantation is, in fact, enforceable under the doctrine of universal succession, which is supported by the evidence of the historical record and the writings of the Supreme Court. There remains the question, however, of what the Mattaponi gain by achieving federal recognition of their Treaty.

FEDERAL NATIVE AMERICAN LAW

Even if the Supreme Court were to find the Treaty of Middle Plantation enforceable under the Supremacy Clause, the Mattaponi may still be unable to achieve their ultimate objective of protecting the Mattaponi River from the reservoir project. federal recognition of the Treaty would rescue it only from the capricious acts of Virginia, but leave it exposed to the legislative whims of Congress. Regardless, the Mattaponi enjoy a significant advantage at the federal level in the substantial body of Native American law

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152 U.S. CONST., art. II, §2, cl. 2.

153 Opposition to the Petition for a Writ of Certiorari, *supra* note 9, at 4, n. 4.

154 Worcester v. Georgia, 31 U.S. 515, 544 (1832).

155 Holden v. Joy 84 U.S. 211, 244 (1872).

that has been forged over the decades by the Supreme Court. This section focuses upon some of the basic tenets of federal Native American law and illustrates the invaluable purpose it serves in providing a standard policy for dealing with Native American affairs.

The Mattaponi claim that "obligations imposed by Indian treaties should be enforced as matters of federal law to ensure their uniform, consistent, and predictable interpretation."[156] Allowing the Virginia Supreme Court to decree that the Treaty of Middle Plantation arises only under state law would allow the lower courts of Virginia to develop their own line of Native American law, which may largely ignore the precedents of the Supreme Court, adopt them, or result in a wholly divergent interpretation.[157] Such a doctrinal ambiguity may result in the development of conflicting standards of interpretation, thereby resulting in complex litigation and the potential for the abrogation of rights that had traditionally been presumed to be safeguarded by the Supremacy Clause and the principles of universal succession to treaties.[158]

The genesis of federal Native American law can be found in the early jurisprudence of the Supreme Court. In *Johnson v. McIntosh*, Chief Justice Marshall faced the difficult question that would serve as the foundation for all subsequent Native American law: who held original title to the lands of North America?[159] Although the Native Americans were the first occupants of the land, Marshall held that their right of occupancy did not carry with it title to the land.[160] Marshall looked to the Age of Discovery and took hold of the principle adopted by the colonial powers "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."[161] This principle not only validated the European powers' colonial missions, but also provided a means to carry out their colonial endeavors while avoiding squabbles over lands amongst themselves. The Court respected the Natives' longtime presence in North America in a limited context, however:

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156 Petition for a Writ of Certiorari, *supra* note 3, at 16.

157 Petition for a Writ of Certiorari, *supra* note 3, at 16–17. *Cf.* Seneca Nation of Indians v. New York, 382 F.3d 245, 261 n. 17 (2d Cir. 2004), petition for cert. filed 6 U.S.L.W. 22 (U.S. Feb. 3, 2006) (No. 05-905) (noting that "although [the federal Indian canons of construction] were articulated specifically with reference to treaties and other legislative enactments by the United States government . . . we see no reason not to apply a similar standard to Indian treaties negotiated by Great Britain, a prior sovereign").

158 Petition for a Writ of Certiorari, *supra* note 3, at 11.

159 21 U.S. (8 Wheat.) 543 (1823).

160 *Id.* at 562.

161 *Id.* at 573.

> They were admitted to be rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the fundamental principle, that discovery gave exclusive title to those who made it.[162]

Thus, the Supreme Court crafted a sort of compromise that granted all rights of land title to the imperial powers and then to the United States as successor in interest to the British, while providing some protection for Native American tribes through a right of occupancy. This compromise avoided two extremes, one where the Native American tribes held exclusive title, regardless of discovery, based upon their prior occupancy, and one where the Native Americans held no rights whatsoever with regard to the land as a result of conquest.[163] This decision serves as a basis for American property law and clearly established the Court's tradition of looking to protect the interests of Native Americans while maintaining the ultimate authority of the United States.[164]

McIntosh did not mark the full extent of Chief Justice Marshall's impact on federal Native American law. Later, in *Cherokee Nation v. Georgia*, the Chief Justice addressed the question of whether the tribe constituted a "foreign State[]" within the meaning of Article III, Section 2 of the Constitution.[165] This highly politicized case prompted Marshall to refuse to reach the merits of the tribe's application by holding that the Cherokee Nation was not a foreign state for jurisdictional purposes.[166] This decision, that the Cherokee Nation did not constitute a "domestic dependant nation," was not a complete defeat for the tribe, however.[167] Marshall wrote, in a manner reminiscent of his splitting the baby approach in *Marbury v. Madison*,[168] that the tribe, while not a foreign nation, does retain an "unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government."[169] Marshall continued on to hold that the Cherokee Nation and other Native American tribes "may, more correctly,

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162 *Id.* at 574.

163 CASES AND MATERIALS ON FEDERAL INDIAN LAW, *supra* note 70, at 68.

164 *Id.* at 68.

165 30 U.S. (5 Pet.) 1 (1831); U.S. CONST. art. III, §2, cl. 1; *See* AMERICAN INDIAN LAW DESKBOOK 1 (Hardy Myers & Clay Smith eds., 3d ed. 2004).

166 AMERICAN INDIAN LAW DESKBOOK, *supra* note 165, at 1.

167 *See id.* at 2.

168 5 U.S. (1 Cranch) 137 (1802) (holding that the Court did not have the requisite jurisdiction to hear Marbury's claim, but legitimized the concept of judicial review).

169 *Cherokee Nation*, 30 U.S. (5 Pet.) at 2.

perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect at point of possession when their right of possession ceases."[170] Justice Marshall's explanation of the meaning of being a "domestic dependent nation" rested upon the perception that Native American tribes are

> in a state of pupilage. Their relation the to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.[171]

The *Cherokee Nation* decision illustrates the special position that Native American tribes occupy in the United States, a position between that of being subjects or citizens, that of domestic foreign nationals.[172] The Court, speaking once again through John Marshall, subsequently stated a trilogy of principles in *Cherokee Nation's* companion case, *Worcester v. Georgia*,[173] that have since been applied as federal common law and serve as part of the foundation of federal Native American law.[174]

Worcester did not first articulate the Marshall Trilogy, as some authorities have termed them, but it did rely upon them as a basic foundation of federal Native American law.[175] First, by virtue of their status as the first possessors of the land, Native American tribes retain a certain amount of preexisting sovereignty.[176] Second, this sovereignty is subject to diminution or elimination by the United States but not by the individual states.[177] Third, a trust relationship exists between the United States and Native American tribes arising out of the tribes' limited inherent sovereignty and their corresponding dependency upon the United States for protection.[178] These basic principles have been the subject of extensive discussion by both the Supreme Court and students of federal Native American law, but regardless of the various glosses that have been applied, the principles remain as they

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170 *Id.* at 17.

171 *Id.* at 17–18.

172 INDIAN LAW DESKBOOK, *supra* note 165, at 2.

173 30 U.S. (5 Pet.) 1 (1831).

174 INDIAN LAW DESKBOOK, *supra* note 165, at 5.

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.*

were articulated in 1832.[179] Application of these principles to the *Mattaponi* case would provide the Tribe with a certain amount of protection arising out of the trust responsibility, but would also allow Congress to abrogate the Tribe's treaty-protected rights should it so desire. Regardless of this possibility, federal recognition of the Mattaponi's treaty claim would allow for application of the Indian law canons of construction for treaty interpretation, which may provide some limit to Congress' ability to abrogate provisions of the Treaty.

The canons of construction did not emerge fully developed but instead developed from ideas articulated in early Native American law cases, such as *Cherokee Nation* and *Worcester*.[180] The Court did articulate the basic premises of the canons in *Jones v. Meehan*, holding that:

> In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed . . . in the sense in which they would naturally be understood by the Indians.[181]

Thus, under the canons of construction, treaties are to be liberally construed in favor of the Native Americans.[182] Furthermore, these treaties are to be interpreted "not according to the technical meaning of [their] words to learned lawyers" but according to how the Native Americans would have originally understood them.[183] Although the canons have expanded and contracted over the years depending on the specific contexts of the cases in which they were invoked, they still remain as the foundational principles for treaty interpretation in Native American law.[184]

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179 *See id.*

180 *See* 30 U.S. (5 Pet.) 1 (1831); 30 U.S. (5 Pet.) 1 (1831).

181 175 U.S. 1, 10–11 (1899).

182 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 83, at 119.

183 *Jones*, 175 U.S. at 11; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 83, at 119.

184 *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 83, at 122–28 (discussing the various challenges and modifications of the canons in specific instances). *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (applying the canons of construction to find that an 1855 treaty did not abrogate the Tribe's usufructuary rights).

The Marshall trilogy and the Native American law canons of construction provide the foundation for all federal Native American law and jurisprudence. As a result, tribes from across the nation may rely upon one cohesive body of law for ensuring that the remnants of their special semi-sovereign status are protected. In denying the Mattaponi's claim that their Treaty is enforceable as a matter of federal law, the Supreme Court has effectively denied the Tribe the protections of over two centuries of law that have developed upon the basic premise that matters arising out of Native American treaties are federal matters. This decision will leave the states to develop their own rival bodies of law[185] in cases where Native American tribes fail to prove that their treaties were assumed by the federal government under Article VI of the Constitution.[186] The Mattaponi have attempted to abide by the terms of their treaty, continuing to this day to pay tribute to the governor of Virginia.[187] Yet, as a result of a war and peace they had no control over, and despite over two hundred years of conducting their affairs with Virginia as though the treaty had the force of law, the Mattaponi are faced with the strong likelihood that their former rights will fall to the practical necessities of providing water for a burgeoning population in southern Virginia. With their pleas falling on deaf ears before the Supreme Court it seems that the only viable option remaining for them is to call upon Congress to take action on their behalf. The Tribe has attempted to obtain federal recognition in the past, but to no avail.[188] Yet, with their judicial options quickly evaporating and the gross inequities they face becoming increasingly apparent, perhaps Congress may finally take notice of the battle for survival that the Mattaponi have waged for over a decade.

CONCLUSION

The Mattaponi face various challenges in their efforts to save the Mattaponi River. Regardless of whether the Supreme Court finds the treaty to be enforceable, the Water Control Board may still issue the Water Protection Permit, because the Board is not required to consider treaty obligations in deciding whether to issue a permit.[189] Furthermore, Virginia offers arguments that the Eleventh Amendment bars suits by Native American tribes against the states.[190] Virginia also raises the question of whether the Matta-

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185 Petition for a Writ of Certiorari, *supra* note 3, at 16–17.

186 CONST. art VI, cl. 1.

187 Robin Farmer, *Holiday Troubling to Va. Indians*, RICHMOND TIMES-DISPATCH, Nov. 23, 2006, at B1.

188 Petition for a Writ of Certiorari, *supra* note 2, at 5.

189 Opposition to the Petition for a Writ of Certiorari, *supra* note 9, at 18.

190 Blatchford v. Native Village of Noatak, 501 U.S. 775, 781 (1991) (holding that the sovereign immunity confirmed by the Eleventh Amendment bars suits by Native American

poni can prove that they are successors in interest to the original signatories of the Treaty.[191] Finally, Virginia also contends that the Supreme Court can not hear the matter because a final judgment or decree had not been issued by the Virginia Supreme Court, as the case was remanded to the trial court.[192] Although these issues all present potential pitfalls to the *Mattaponi* case, the Tribe's central claim—the ultimate enforceability of the Treaty of Middle Plantation under the Supremacy Clause—enjoys support in the documentary record and the doctrine of universal succession. Moreover, the principles of federal Native American law support a reading of the treaty that protects the Mattaponi's rights to their reservation lands and fishing rights on the Mattaponi River, regardless of Virginia's laches arguments.

Native American tribes in the United States have suffered a lingering defeat. Beginning with the arrival of British colonists in Virginia in the late sixteenth century and continuing until the modern day, Native Americans, their tribes, and their cultures, have withered from their once vibrant presence in North America to a point where they are desperate not to be entirely engulfed by the broader American culture. The Mattaponi are a small tribe, remnants of a great Native American confederacy. Fewer than one hundred members live on their reservation trying to eke out an existence while maintaining what they can of their culture, including fishing for the North American shad on the banks of the river that bears their name.[193] The Study Group originally developed thirty-one different options for solving Virginia's water needs; perhaps there is an alternative to the destruction of a portion of the traditional Mattaponi reservation.[194] Regardless of the alternatives, however, the founders intended that all treaties formed under the Articles of Confederation remain in full force, and that intent, coupled with the theory of universal succession to treaties, stands in support of the proposition that pre-revolutionary treaties executed between Native American tribes and the colonial powers are binding under the Supremacy Clause of the United States Constitution. Thus, when, as will likely occur, the Mattaponi's cases against Newport News and the State Water Control Board reach the United States Supreme Court, the Court should issue a writ of certiorari and ultimately hold that pre-revolutionary treaties with Native Americans enjoy the status of being the "supreme law of the land" as a result of the application of the doctrine of the universal succession to treaties executed before independence.

Tribe against the States) as cited in Brief of the State Respondents in Opposition to the Petition for a Writ of Certiorari, *supra* note 9, at 16–17.

191 Opposition to the Petition for a Writ of Certiorari, *supra* note 9, at 15.

192 Opposition to the Petition for a Writ of Certiorari, *supra* note 9, at 19.

193 Opposition to the Petition for a Writ of Certiorari, *supra* note 9, at 4.

194 *See* note 49.